

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ESTHER IRWIN and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Albany, NY

*Docket No. 99-1559; Submitted on the Record;
Issued September 11, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$1,045.11 for the period from May 26 to July 7, 1994 under section 8129(b) of the Federal Employees' Compensation Act; and (2) whether the Office properly found that appellant was not "without fault" in the creation of that overpayment and that, therefore, the overpayment was not subject to waiver.

On March 15, 1993 appellant, then a 50-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained an injury in the form of lower back pain radiating to her right hip as she lifted a patient to his bed. She stopped work on March 15, 1993. The Office accepted appellant's claim for lumbosacral sprain and left knee contusion. The record shows that the Office paid compensation benefits to appellant for the period from May 26, 1993 to July 7, 1994 and that appellant returned to full-time light-duty work on May 26, 1994.

On September 7, 1994 appellant filed a recurrence of disability claim (Form CA-2a) alleging that on that date she sustained a recurrence of her March 15, 1993 employment injury when she continuously bent over to draw blood.

By letter dated June 11, 1997, the Office advised appellant of its preliminary determination that an overpayment of compensation was paid in the amount of \$2,848.86 and that appellant was not without fault in creating the overpayment as she should have been aware that she was not entitled to receive compensation for total disability after she returned to full-time light-duty work on May 26, 1994. The Office noted that appellant received compensation after she returned to work on May 26, 1994 for the period of May 26 to July 7, 1994.

On June 17, 1997 appellant requested a hearing before an Office hearing representative on the issue of fault and waiver of the overpayment.

Appellant submitted an overpayment recovery questionnaire (Form 20) dated June 16, 1997 stating that she did not know she was overpaid for the period from May 26 to July 7, 1994 because her compensation benefits were irregularly paid. She noted her resources, assets and monthly expenses. Appellant stated that she notified the Office when she returned to work on May 26, 1994 but she did not know that she was overpaid.

By decision dated October 21, 1997, the hearing representative set aside the Office's June 11, 1997 preliminary determination and remanded the case for further development. The hearing representative found that no formal finding of fault was made and that the record lacked any development in that regard. The hearing representative also found that the record contained no memorandum or rationale explaining the Office's determination of fault.

By letter dated November 28, 1997, the Office again advised appellant that it made a preliminary determination that an overpayment of compensation was paid to her in the amount of \$2,848.86 and that she was not without fault in creating the overpayment as she was aware that she was not entitled to receive compensation for total disability after returning to full-time light-duty work on May 26, 1994. The Office found that appellant received compensation after she returned to work on May 26, 1994 for the period of May 26 to July 7, 1994.

On December 21, 1997 appellant again requested a hearing before an Office hearing representative on the issue of fault and waiver. She alleged that she was unaware that she had received an overpayment until she took a disability retirement because her compensation checks were paid irregularly and she believed that the employing establishment notified the Office that she returned to work. Appellant requested that the Office waive the overpayment because of financial hardship.

On January 28, 1999 a hearing was held before an Office hearing representative. Appellant testified, among other things, that she knew she was not entitled to compensation benefits following her return to work on May 26, 1994 but she believed she was entitled to the "one or two" payments she received after that date because the Office was behind in its payments to her. Appellant stated: "I did n[o]t count the checks and I should have done save actual check. But I did n[o]t." Appellant testified that the employing establishment notified the Office that she returned to work. She also testified that her annual income is \$9,000.00 and her husband's annual income is \$50,000.00.

Appellant submitted a second overpayment recovery questionnaire (Form 20) dated January 28, 1999. She indicated by check mark that she did not have any of the incorrectly paid checks or payments in her possession. Appellant noted her income and her spouse's income, as well as their resources and assets. She also noted her household expenses and other liabilities. Appellant stated that after she returned to work, the employing establishment did not pay her for three weeks and she believed that the compensation benefits she received were owed to her. She also stated that the employing establishment notified the Office "immediately" that she returned to work and that she would not have been permitted to work without medical clearance and Office notification. Appellant alleged that she was not at fault in creating the overpayment as she thought the payments were "part of back weeks owed." She stated that it was "almost impossible" to communicate with the Office because its voice mail system was full. Finally, appellant noted that she was nearly bankrupt.

By decision dated March 26, 1999, the hearing representative affirmed the preliminary finding of the Office that appellant was not without fault in creating the overpayment and, therefore, the overpayment could not be waived. The hearing representative noted that the compensation checks were sent directly to appellant and that each check showed the period for which compensation was paid. The check dated June 24, 1994 was for the period of May 29 to June 25, 1994 and the check dated July 8, 1994 was for the period of June 26 to July 7, 1994. The hearing representative, therefore, found that appellant was not without fault in creating the overpayment as she was aware or should have been aware that she was not entitled to compensation after returning to work and the checks she received after May 26, 1994 stated the periods of compensation benefits paid. The hearing representative reduced the \$2,848.86 overpayment amount to \$1,045.11 by recalculating appellant's compensation benefits to include night shift, Saturday and Sunday differential wages. He noted that appellant's monthly household expenditures exceeded her income by over \$2,000.00, however, he did not waive repayment because she was not without fault in creating the overpayment. The hearing representative determined that \$100.00 monthly recovery payments would allow the Office to expeditiously recover the overpayment while minimizing financial adversity to appellant.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,045.11 for the period from May 26 to July 7, 1994 under section 8129(b) of the Act.

The record shows that the Office made compensation benefit payments to appellant for the period from May 26, 1993 to July 7, 1994, after appellant returned to work on May 26, 1994, at the weekly pay rate of \$648.79. The record also shows that appellant was entitled to receive weekly compensation benefits at the rate of \$695.18 for the period from May 16, 1993 to May 24, 1994. Therefore, the amount of appellant's overpayment is \$1,045.11.

The Board also finds that the Office properly determined that appellant was not without fault in the creation of the overpayment.

Section 8129(b) of the Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

¹ 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)"²

In this case, appellant is not "without fault" because she accepted payments of compensation benefits which she knew or should have known were incorrect. The Office informed appellant by its May 10, 1994 letter that she would be paid every four weeks until July 7, 1994 or until she returned to duty, whichever occurred first. The letter also instructed appellant to notify the Office immediately upon her return to work and to return any compensation check received after returning to work in order to prevent an overpayment of compensation. Further, the record reveals that the checks dated June 24 and July 8, 1994 showed that compensation was paid for the period of May 29 to July 7, 1994. Appellant testified during her January 28, 1999 hearing that she was aware that she was not entitled to benefits following her return to work on May 26, 1994. The overpayment may not be waived as appellant is not "without fault" in helping to create the overpayment and, therefore, she is not entitled to seek waiver of recovery of the overpayment.

With regard to the question of whether the Office properly required recovery of the overpayment at the rate of \$100.00 per month, the Board notes that its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.³ As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction to consider the Office's recovery of the overpayment under the Debt Collection Act.

² 20 C.F.R. § 10.433(a).

³ *Robert S. Luciano*, 47 ECAB 793, 799 (1996).

The decision of the Office of Workers' Compensation Programs dated March 26, 1999 is affirmed.

Dated, Washington, DC
September 11, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member